inquire. Under our system of government the courts are not concerned with the wisdom or policy of legislation."

The prevailing opinion is in effect that the court will inquire into the policy of legislation far enough to ascertain whether its purpose and effect are, in reality, to evade and defeat those constitutional guarantees intended for the benefit of the individual as against unjust legislation by the state.[37]

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MANDAMUS AGAINST A GOVERNOR

THE question whether the courts have the power to issue the writ of mandamus against the chief executive of a state to compel the performance of a duty imposed upon him by law, has been answered in two irreconcilable lines of decision—the one being that the Governor is not answerable to the writ to compel the performance of his duty, be it either discretionary or ministerial in its character, the other, that he is liable to the writ to compel the performance of duties purely ministerial in nature. Mr. High, in his work on Extraordinary Legal Remedies,[1] says:

"The jurisdiction of courts by mandamus over executive officers, including Governors of states, heads of executive departments of the general government, and others of kindred nature, has given rise to questions of much difficulty, and not a little conflict of authority has resulted from the efforts of the courts to apply the general principles of the law of mandamus to such cases. And while, as to purely executive or political functions devolving upon the chief executive officer of the state, and as to duties necessarily involving the exercise of official judgment and discretion, the doctrine may be regarded as uncontroverted that mandamus will not lie, yet as to duties of a ministerial nature and involving no element of discretion, which have been imposed by law upon the Governor of a state, the authorities are exceedingly conflicting and indeed utterly irreconcilable."

The views adopted by the different courts are stated in Spelling on Extraordinary Relief[2] thus: "No little conflict exists as to the

[37] See State *v.* Dodge (Vt.), 56 Atl. R. 983, holding the "Anti Trading Stamp Law" of Vermont an unconstitutional interference with the right of the citizen to contract. People *v.* Gillson, 109 N. Y. 389.

[1] § 118 (3rd Ed).

[2] Vol. II, § 1452.

power of the judiciary to control the chief executive officer of the state by mandamus. In those states where, with respect to purely ministerial duties, the power is asserted, the argument proceeds upon the ground that the mere fact that the duties are due by the chief executive, should not deter the courts from compelling their performance in a proper case. The opposing argument is based upon the principle that under our form of state government, separating all powers into three distinct branches, each should be kept free from interference by either of the others, and that the executive department as regards the duties imposed upon it by law is entirely independent of control in any degree whatever by the judiciary. While as before stated the views of the courts in the various states radically differ, the doctrines denying the right of interference even with respect to duties usually considered as ministerial is supported by the clear weight of authority."

Moreover, whatever position is adopted as to the powers of our courts to grant this writ of mandamus, directed to the chief executive of a state, it seems to be settled that it will never be granted so as to control the judgment or discretion of such officer.

A recent case in which the conflict of views upon this subject is clearly stated is that of *The State of Ohio ex rel. Trauger* v. *Geo. K. Nash.*[3] The material facts in this case, as stated in the petition for mandamus, were in substance that the relator was an elector, citizen and taxpayer, and the owner of realty in Franklin county, Ohio; that the defendant, Geo. K. Nash, was the duly elected, qualified and acting Governor of the state; that by reason of the resignation of the Lieutenant Governor, a vacancy had arisen in the office of Lieutenant Governor; that it is the duty of the said Governor, enjoined upon him by sections 11 and 81 of the Revised Statutes of Ohio, to appoint an elector of the state to fill the said vacancy, to hold the same until his successor shall be elected and qualified, and that the defendant, entertaining doubts with respect to his duties in the premises, had neglected and refused to fill the vacancy by appointing an elector to said office.

The defendant appeared and filed a demurrer to the petition, which raised the issue whether or not the Governor can be compelled by the writ of mandamus to appoint an elector to the office of Lieutenant Governor, in accordance with the above mentioned sections of the Revised Statutes.

The court, speaking through DAVIS, J., in part said: "While there is irreconcilable conflict in the opinions on the subject, we

[3] (1902) 66 Ohio St. 612; 64 N. E. 558.

are of the opinion that the better reasoning is found in those cases which reach the conclusion that a writ of mandamus may be directed to the Governor or any other officer, to compel the performance of clear legal and mandatory duties. Assuming for the present purpose that the duty of the Governor to act when a vacancy occurs in the office of Lieutenant Governor, is found in the statute, it is clear that the duty thus imposed is mandatory. The Governor is allowed no discreiton as to acting, however much discretion he must necessarily exercise in selecting the person whom he shall appoint.

"The power to appoint officers does not inhere in the office of Governor. When no such power is conferred on the Governor by the constitution or by valid enactment by the legislature, he cannot exercise such power.

"The power to appoint to fill a vacancy has been delegated by the people to the legislative branch of the government, and that branch has by law directed the Governor to perform it. It becomes therefore a purely ministerial duty to appoint."

It is proposed to review here the cases wherein the question has been decided, covering the period of time from the year 1839 to and including the decision of another very recent case, that of *State ex rel. Higdon* v. *Jelks, Governor,*[4] and to make this examination in the light of the discussion in *State of Ohio* v. *Nash.*

The Arkansas Supreme Court had their attention directed to this point in the case of *Hawkins* v. *The Governor,*[5] in which there was a petition for a rule upon the Governor of the state, to show cause why a mandamus should not be awarded against him commanding him to issue a commission to the petitioner. The Governor replied, refusing to issue the commission upon the ground that at the time the election was held there was no law in force authorizing the Legislature to hold an election.

The court held, that it had no power to grant mandamus to compel him to issue the commission. The reasoning of the court is, "That the court can no more interfere with executive discretion than the Legislature or executive can with judicial discretion.

"It would be an express violation of the constitution, which declares upon its face 'that there shall be three separate and independent departments of the government, and that no person or persons, being of one of these departments, shall exercise any power belonging to either of the others.' This being the case, it is clearly demonstrable that the court has no jurisdiction of the cause now

[4] (1903) 138 Ala. 115; 35 So. 60.
[5] (1839) 1 Ark. 570.

under consideration, and they have no power to award a mandamus to the Governor to compel him to grant the commission."

Again, we find the question presented in the case of *The State of Georgia ex rel. Low* v. *Towns, Governor*,[6] wherein the relator applied for the writ against the Governor to issue to him a commission as Clerk of the Court of Ordinary, though he had failed to establish his title to the office, by the judgment of a court of competent jurisdiction. The court decided that inasmuch as the relator's right to a commission was not apparent to the Governor, the writ would not lie. The case is important only for the dictum pronounced by JUSTICE WARNER, in which he intimated that mandamus would not lie against the Governor, not only as to duties of a strictly executive or political nature, but even as to purely ministerial acts whose performance the Legislature may have required at his hands, basing his opinion upon the fact of the separation, distinction and independence of each branch in our system of government.

The rule upon the Governor and Council and Secretary of State, to show cause why a writ should not issue commanding them to declare the petitioner elected to the office of County Commissioner, was also denied in the case of *Dennet, petitioner, etc.*,[7] on the ground of the distinct division of departments of our government; following substantially the case of *Hawkins* v. *The Governor,* supra.

In the year 1856 two cases bearing on this question arose, one in Missouri and the other in New Jersey. In the case of *The Pacific R. R. Co.* v. *Governor,*[8] the question arose incidentally, and though much discussed, no opinion was given on it. The later Missouri decisions,[9] will be reviewed in their chronological order.

In the case of *State* v. *Governor*,[10] an application was made for a rule upon the Governor requiring him to show cause why mandamus should not be awarded, commanding him to issue a commission to the applicant, as surrogate of the county of venue. There were two claimants to the office, one holding the decision of the board of commissioners in his favor; the other claiming to have a majority of the legal votes cast at the election. The court denied the writ, and GREEN, C. J., said: "The exercise of such power would be an unwarrantable interference with the action of the executive within his appropriate sphere of duty."

Next in order, the case of *The People of State of Illinois* v. *Bis-*

[6] (1850) 8 Ga. 360.

[7] (1851) 32 Me. 508.

[8] (1856) 23 Mo. 353.

[9] State ex rel. Bartley *v.* Fletcher, Governor, (1867) 39 Mo. 388, and State ex rel. Robb *v.* Stone, Governor, (1894) 120 Mo. 428.

[10] (1856) 25 N. J. L. (1 Dutch.) 331.

sell, Governor,[11] was decided by the Illinois Supreme Court, wherein the application was refused, on the ground that the Constitution has provided the only remedy, which is by impeachment. In this case the relator asked the court to order that a writ of mandamus be issued, directed to the Governor of the state, commanding him to issue to the relator new bonds of the state, for the arrears of interest due upon certain other bonds, as the said Governor is required to do by an act of the General Assembly. CATON, C. J., said in part: "We have no power to compel either of the other departments of the government to perform any duty which the Constitution or the law may impose upon them, no matter how palpable such duty may be, any more than either of those departments may compel us to perform our duties. The Governor is, and must be, as independent of us as is the Legislature, or as we are of either of them. When acting within the limits assigned to each, neither can control or dictate to the other. The presumption is, that one is as likely to be right, or as liable to err, as the other."

It is held in the case of *The People ex rel. Harless* v. *Yates, Governor, et al.,*[12] that the writ will not lie against the Governor, to compel him to deposit in the office of the Secretary of State, a bill which was passed by the general assembly, and placed in the hands of the Governor for his consideration, and which had not been returned to the proper house within the time limited by the Constitution with his objections.

Two years later the Rhode Island court held[13] that it had no jurisdiction to issue its writ of mandamus, to compel the defendant to perform the duty which was alleged to have been disregarded, and based its decision largely upon the cases thus far considered.

WAGNER, J., in *State ex rel. Bartley* v. *Fletcher, Governor,*[14] said in part: "As to all powers conferred or duties enjoined by the Constitution on the Governor he is entirely independent of the judiciary, and responsible to the people alone at the polls, and liable to impeachment for misdemeanor in office."

While the case of *Harpending* v. *Haight, Governor,*[15] held, that the writ of mandamus would lie to enforce the performance of a ministerial duty by the Governor of a state, it is well to note at this time that a vigorous dissenting opinion was rendered by TEMPLE, J., who pronounced his views in accordance with the cases above

[11] (1857) 19 Ill. 229.

[12] (1863) 40 Ill. 126.

[13] In Mauran *v.* Smith, Governor, (1865) 8 R. I. 192.

[14] (1867) 39 Mo. 388.

[15] (1870) 39 Cal. 189.

referred to and considered. The case will receive a more detailed discussion further on.

The next case in order is that of *The State of Louisiana ex rel. Oliver et al.* v. *Warmoth, Governor, et al.*[16] In this case the court, through TALIAFERRO, J., laid down the rule that a writ of mandamus will not lie to compel the chief executive officer of the state to perform *any* act coming within the range of his duties as Governor.

Two years later the same distinguished judge had occasion to pronounce the decision in a case in which the same question was presented;[17] and in the course of his opinion he said: "We had occasion in the case of the *State on the relation of Oliver et al.* v. *the Governor of the State, 22* Annual, page 1, to go at some length in the inquiry as to the power of the judiciary to compel by mandamus the chief executive officer of a state to perform acts required by law to be done by him. We then concluded that such a power is not vested in the judiciary, and see no good grounds for receding from the views then taken of this subject."

The Minnesota court in the case of *Daniel Rice et al.* v. *Austin, Governor,*[18] refused to recognize any distinction between ministerial and "other" duties, and dismissed the application for the writ, saying, "That the constitutional provisions, by which the departments of government are made distinct and independent, are broad and general and recognize no such distinctions."

When the question arose in Michigan,[19] COOLEY, C. J., seemed to doubt the right of the courts to say that this or that duty might properly have been imposed upon the Secretary of State or other officer, and that inasmuch as in case it had been so imposed, there would have been a judicial remedy for neglect to perform it, therefore there must be a like remedy for neglect by the Governor himself; but the court decided the case on the ground of a lack of jurisdiction and declined to entertain the application for the mandamus.

The Supreme Court of Tennessee holds that the issuance of a commission or certificate of election, whether called a ministerial or an executive duty, is an official action, whose performance can be neither coerced nor restrained by the courts.[20]

In *Appeal of Hartranft, Governor,*[21] it was held, that courts can-

[16] (1870) 22 La. Ann. 1.

[17] The State of La. ex rel. Mississippi Valley Navigation Company *v.* Warmoth, Governor, (1872) 24 La. Ann. 351.

[18] (1872) 19 Minn. 103.

[19] Sutherland *v.* The Governor, (1874) 29 Mich. 320.

[20] Turnpike Co. *v.* Brown (1875), 67 Tenn. 490; Bates *v.* Taylor (1889), 87 Tenn. 319.

[21] (1877) 85 Pa. St. 433.

not compel the Governor to perform any duties appertaining to his office, nor can they interfere with his discharge of them.

The question arose for the first time in Florida in 1879 in *The State ex rel. Bisbee* v. *Drew, Governor,*[22] the court holding that the Governor cannot be commanded by the courts to perform any act which may be required of him by the law of the state relating to the executive office, nor any duty which he may be required to perform of a political nature. Mr. JUSTICE WESTCOTT delivered a strong dissenting opinion, which will be treated with the cases that take views diametrically opposed to those here advanced.[23]

The case of *The People* v. *Bissel,*[24] was affirmed twenty-four years later in *People ex rel. Bacon* v. *Cullom, Governor,*[25] in which it was held that one coordinate branch of the government had no power to interfere with and coerce the action of another, and consequently the writ was denied; and the power to issue mandamus against the Governor in any case was denied by the Mississippi court.[26]

Indiana follows the holdings of the courts above enumerated as is shown in *Hovey, Governor,* v. *The State, ex rel. Schick.*[27] In this case the title to the office of county auditor was in dispute, and hence the Governor of the state refused to issue a commission. This suit was instituted to compel by mandamus the issuance of such commission. The conclusion was reached that the decision of the Governor must be taken as final, as the courts have no power to compel the Governor in matters of this kind.

The question arose in Louisiana, in 1890, for the third time, and the court followed its former decisions,[28] and in a well reasoned opinion came to the conclusion that whenever state officers of the executive branch of the government are vested with discretionary functions, under the Constitution and laws of the state, in the performance of civil duties, or political powers and responsibilities devolve upon them, their acts are only examinable politically, and

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[22] (1879) 17 Fla. 67.

[23] Western R. R. Co. *v.* DeGraff et al., (1880) 27 Minn. 1, supports the views expressed and position taken by the above cases. While the question was not put in issue in the case of Gray, Governor, et al. *v.* State, ex rel. Coghlen, (1880) 72 Ind. 567, it was strongly intimated that the writ would not lie against the governor to enforce the performance of an executive duty.

[24] (1857) 19 Ill. 229.

[25] (1881) 100 Ill. 472.

[26] Vicksburg & Meridian R. R. Co. *v.* Lowrey, (1883) 61 Miss. 102.

[27] (1890) 127 Ind. Rep. 588.

[28] Oliver *v.* Warmoth, 22 La. Ann. 1; State *v.* Warmoth, 24 La. Ann. 351.

they are not answerable to the judiciary or subject to judicial process.[29]

Although the precise point now presented had never up to 1894 been decided in the State of Missouri, yet in the case of *State* v. *Governor*,[30] the clear intimation is made by the court, that there is really no valid distinction between a political and a ministerial act of the Governor, when considered with reference to the issuance of a mandamus against him; and later the same court held that mandamus will not issue to the Governor to compel the performance of any duty pertaining to his office, whether political or merely ministerial, whether commanded by the Constitution or by some statute.[31]

The New York Court of Appeals said: "Courts of this state have no power to issue a mandamus to the Governor to compel his performance of a duty imposed upon him by virtue of his office, and this inability extends to ministerial duties as well as to those involving executive judgment and discretion, and to action by the Governor as an ex-officio member of a board of public officers."[32]

This concludes the array of authorities supporting the proposition that the writ will not lie against the Governor to compel the performance of any official duty, he being entirely removed from the control of the courts, without regard to the question as to the nature of his duties, whether strictly executive or political, or purely ministerial.

The contrary view has been adopted by the courts of last resort of the States of Ohio, North Carolina, Alabama, Maryland, California, Montana, Kansas, Nebraska, Colorado and Kentucky. The decisions date from the year 1856 down to June, 1903.

These states, while granting the complete independence of the Governor of the state from judicial control in the performance of his purely executive and political functions, have held, as to ministerial duties incumbent by law upon him, and which the Legislature might with equal propriety have required any other officer to perform, that the writ of mandamus will lie to compel the performance of such duties.

The first case in Ohio and one followed in the case of the *State* v. *Nash*,[33] is, *The State of Ohio* v. *Chase, Governor*,[34] wherein appli-

[29] The State ex rel. Hope & Co. *v.* Board of Liquidation, (1890) 42 La. Ann. 647. Justice FENNER, dissenting.

[30] 39 Mo. 398.

[31] State ex rel. Robb *v.* Stone, Governor, (1894) 120 Mo. 428.

[32] People *v.* Levi Morton et al., (1898) 156 N. Y. 136.

[33] 66 Ohio St. 612.

[34] (1856) 5 Ohio St. 528.

cation was made for a writ of peremptory mandamus. The relators allege that they have organized a banking association, as a branch of the State Bank of Ohio, at Cincinnati, which has been found upon due examination under the direction of the board of control, to have complied with the provisions of the act to incorporate the State Bank of Ohio and other banking companies and therefore lawfully entitled to commence and carry on the business of banking, at the place of its location; and that upon proper application made to the defendant, as the Governor of the state, to issue his proclamation as required by the statute, setting forth that the company is duly organized and authorized to commence and carry on that business, he has refused to perform the duty enjoined upon him. The relators, therefore, invoke the compulsory process of the court, requiring the performance of such alleged duty. Several questions were presented for determination, but the one to be presently given, is the only one necessary to receive attention in this connection. The issue was, whether the Governor could be controlled in his official action by the authority of a writ of mandamus from the Supreme Court.

It was claimed on the part of the defense, that, inasmuch as the government is by the Constitution divided into the three separate and co-ordinate departments, the legislative, the executive, and the judicial, and inasmuch as each department has the right to judge of the Constitution and laws for itself, and each officer is responsible for an abuse or usurpation in the mode pointed out in the Constitution it necessarily follows that each department must be supreme within the scope of its powers, and neither subject to the control of the other, for the manner in which it performs, nor its failure to perform, either its legal or constitutional duties. BARTLEY, C. J., says: "This argument is founded on theory rather than reality. That each of the three co-ordinate departments has duties to perform in which it is not subject to the controlling or directing authority of either of the others, must be conceded. But this independence arises not from the grade of the officer performing the duties, but the nature of the authority exercised. However, therefore, the Governor in the exercise of the supreme executive power of the state may, from the inherent nature of the authority in regard to many of his duties, have a discretion which places him beyond the control of the judicial power, yet in regard to a mere ministerial duty enjoined on him by statute, which might have been devolved on another officer of the state, and affecting any specific private right, he may be made answerable to the compulsory process of this court by mandamus." This clearly and

forcibly announces the present attitude of the Ohio courts, as appears from the decision in the most recent case decided in that state.[35]

The next case in point of time after the earlier Ohio case is that of *Tennessee & Coosa R. R. Co.* v. *Moore.*[36] The argument advanced in support of the views adopted are well stated, and are in conformity with *Ohio* v. *Chase.*[37] Part of the opinion will be quoted: "Any attempt on the part of the judiciary to control or direct the Governor in the performance of executive duties, about which he has a discretion, and may exercise his own judgment, would be a manifest usurpation of power. But there is nothing in the nature of his office, which can prevent the Legislature from assigning to the Governor the performance of some mere ministerial acts, in regard to which he is not clothed with any discretionary power, his whole duty being that of simple obedience to the command of the Legislature; and when this is done, the Governor is to be viewed as merely the ministerial agent of the law; and if he fails or refuses to perform the act required of him, he is answerable to the law; and any person whose rights are dependent on the performance of such act, may have redress by resorting to the appropriate legal remedy."

At about the same time that the Alabama courts were deciding the point, the question arose in North Carolina in the case of *Cotton* v. *Ellis, Governor,*[38] and the court came to the same conclusion as that given in the former case and seems to have founded its decision on the same line of reasoning. The Maryland court denied the writ of mandamus because the act to be performed was not purely ministerial, but required the exercise of judgment and discretion in the officer.[39]

In a California case mandamus was asked for to compel the Governor to execute to the petitioner a patent for a tract of land. The preliminary steps and proceedings had all been taken in pursuance to the laws of the state. Nothing remained to be done except the issuance of the patent, by the Governor. He refused to execute it. RHODES, J., held, that it was the Governor's duty to execute the patent, and that mandamus would lie to compel him to do so, provided the other proceedings were according to law.[40]

As above stated, the Maryland court in *Miles* v. *Bradford,* having

[35] State *v.* Nash, (1902) 66 Ohio St. 612.
[36] (1860) 36 Ala. 371.
[37] 5 Ohio St. 528.
[38] (1860) 52 N. C. (7 Jones) 545.
[39] Miles *v.* Bradford, Governor, (1864) 22 Md. 170.
[40] Middleton *v.* Low, Governor, (1866) 30 Cal. 596.

found that the duty sought to be enforced was not purely ministerial in its nature, dismissed the application; but the question is squarely presented two years later in the case of *Magruder* v. *Swann, Governor*,[41] in a petition praying for an order requiring Swann to show cause why a writ of mandamus should not issue, commanding him to issue a commission to the petitioner as Circuit Judge. The court held, that the Governor, like all other public officers in the discharge of mere ministerial duties, is subject to the writ of mandamus; the writ was accordingly granted.

In the case of *Harpending* v. *Haight, Governor*,[42] WALLACE, J., with whom concurred CROCKETT, J., held, that the court has jurisdiction of the writ, and may issue it to compel the Governor to perform a ministerial act required by law and not included within the powers confided to his discretion; TEMPLE, J., dissented. The majority decision is in harmony with the prior California case.[43]

The Maryland court in the case of *Groome* v. *Gwinn*,[44] adhered to the rule announced in *Magruder* v. *Swann*,[45] and the Governor was compelled to administer the oath of office to one elected to the office of Attorney General, the administering of the oath being merely ministerial.

In the same year the Montana court in the case of *Chumasero* v. *Potts*,[46] held that "The court can compel the Governor of the territory, by its writ of mandate, to perform the ministerial act of canvassing the vote upon said capital law."

The courts of Kansas adhere to the rule that the writ will issue in cases where the act to be performed is purely ministerial in character and is imposed by statute;[47] and the Nebraska courts hold to the same view.[48]

A case arose in Colorado in the year 1892, *Greenwood Cemetery Land Co.* v. *Routh et al.*,[49] which is one of the best reasoned decisions, and pregnant with such cogent argument that it will be well to quote extensively from that opinion as rendered by JUDGE ELLIOT. The action was against the Governor et al. in the matter of signing a patent, and presented substantially the same facts as those of *Middleton* v. *Low*,[50] wherein the preliminary

[41] (1866) 25 Md. 173.
[42] (1870) 39 Cal. 189.
[43] Middleton *v.* Low, 30 Cal. 596.
[44] (1875) 43 Md. 572.
[45] 25 Md. 173.
[46] (1875) 2 Mont. 242.
[47] Martin, Governor *v.* Ingham, (1888) 38 Kan. 641.
[48] The State ex rel. Bates *v.* Thayer et al., (1890) 31 Neb. 82.
[49] 17 Colo. 156.
[50] 30 Cal. 596.

proceedings had been conducted and the land sold as the statute provides. The defense was a challenge of the jurisdiction of the court to issue the writ of mandamus against the Governor. The court in part said: "But may not the Governor be invested with certain powers and duties in the exercise of which, under certain circumstances, he may have no discretion, powers and duties which are neither political nor governmental in their nature, powers and duties which might have been devolved upon some other officer or person, and in which the specific rights of private persons as well as the rights of the public, may be involved? Strange to say, in response to questions like the foregoing, some difference of judicial opinion has been expressed; but the greater number of opinions, and opinions which seem to us sustained by the better reason, concur in an affirmative answer." * * * "Before it can properly be held that the court is without jurisdiction to control the Governor in the matter of signing the patent, it must appear that the Governor's action in the premises is discretionary, or that it properly pertains to the executive department of the government as one of his governmental or political powers, or else it must appear that the subject-matter of the litigation is not within the sphere or class of powers properly belonging to the judicial department.

"The legislative, executive and judicial departments of the state government are distinct from each other, and so far as any direct control or interference is concerned, are independent of each other; but the powers of a single department are not absolute and may be incidentally affected by the action of another department."

Kentucky recognized the doctrine that mandamus will lie against a Governor, to control the performance of ministerial duties, in a case recently decided.[51] In that case the Governor had refused to perform a ministerial duty of issuing a commission, as required by statute, and it was held that mandamus would lie against the Governor to compel the issuance of such commission. The court, speaking through PAYNTER, J., says: "The Supreme Courts of some states have held that a mandamus will not lie to compel a Governor to perform a ministerial act imposed by law; refusing to discriminate between those duties which are governmental and political in their character, involving discretion and judgment, and those which are ministerial, in the performance of which no judgment or discretion need be exercised. The Supreme Courts of other states discriminate between those duties which are governmental or political in their character, involving discretion and judgment, and those which are ministerial, in the performance of which

[51] Traynor *v.* Beckham, Governor, (1903) 74 S. W. 1105.

no judgment or discretion need be exercised. In the latter view we concur. All courts agree that a mandamus will not lie against a Governor to compel the exercise of governmental, political or discretionary powers."

The latest case upon this question is that of *The State ex rel. Higdon* v. *Jelks, Governor.*[52] This was an application for the writ of mandamus to require the Governor to re-instate the relator to the office of colonel of the Third Regiment of the Alabama National Guard. The facts disclosed by the record show, that the relator was duly elected, but was suspended, and later demanded to be restored to his command. HARALSON, J., says: "According to the view we take of the case, we may forego a re-examination and discussion of this question, since, conceding the right in the courts to control the Gvernor in matters purely ministerial, we are of opinion, as was the judge below, that in refusing to grant the requests of petitioner, the Governor was not acting in a purely ministerial capacity, but in a matter involving the exercise of his judgment and discretion, as commander-in-chief of the state troops, in order to promote their efficiency in the service."

In the examination and discussion of all the adjudicated cases upon this question, dating from the year 1839 up to and including cases decided as late as June 30, 1903, there is obviously but one clear and potent ground upon which cases following the doctrine as pronounced by the Ohio Supreme Court in the case of *The State* v. *Nash,* supra, have placed their decisions, and that is, that when the statute expressly provides that a particular duty shall devolve upon the Governor, and when it is such a duty as might have been delegated by the Legislature, to some other officer to be performed by such officer, the duty is purely ministerial, the performance of which can be required by the courts, in the same manner and for the same reasons, as if the duty had been made incumbent upon some officer other than the Governor. In view of the trend of judicial authority and the reasons upon which the decisions are based, and in consideration of the nature of the writ of mandamus, particularly in respect to its enforceability, the rule adopted by the courts which hold contrary to the rule as enunciated in the Ohio case[53] is found to be the preferable one and is based upon the more logical and cogent reasoning.

The rule, *that the Governor of a state is not amenable to the writ of mandamus, to compel the performance of a duty, be it min-*

[52] (1903) 138 Ala. 115; 35 So. 60.

[53] The State *v.* Nash, 66 Ohio St. 612.

isterial or discretionary in its nature, is the one which seems to be more in accord with sound legal principles. And as a basis for this conclusion, the following reasons are advanced:

First—That the rule that the writ is issuable and enforceable against the Governor of a state, in matters purely ministerial in character, is clearly against the great weight of judicial authority.

Second—If the writ of mandamus were granted, it would prove unavailing.

Third—The independent and distinctive features of the departments of government forbid the interference by one with the other.

Fourth—The Governor's accountability to the people at the polls, and his liability to impeachment, afford adequate remedies for his failure to perform ministerial duties.

There seems to be no doubt as to the trend of judicial authority and no further comment upon that point is necessary.

It is a fundamental principle of law, that the writ of mandamus will never be granted in cases where, if issued, it would prove unavailing. And where the object sought is impossible of attainment, that is, where there is a want of power to enforce it, if granted, it will be withheld. The Governor being the chief executive officer of the state, is not amenable to the processes attempted to be enforced by executive officers of a rank inferior to him. No power exists to compel the chief executive to act.

In the case of *The State* v. *Nash* the contention of the relator was that the Constitution of the state authorized the Legislature to fill or provide for filling all vacancies; and that the Legislature having seen fit to delegate this power to the Governor, it became, therefore, a purely ministerial duty to appoint.

But, the Constitution does not provide a remedy for the failure of the Governor to perform the duty, other than his liability to impeachment and removal from office.

The doctrine of the non-liability of a chief executive officer was first recognized in the case of *Madison* v. *Marbury,*[54] in which it was laid down, that in no case would the writ go against the President of the United States. No distinction can be drawn between the President of our country and the Governor of a state, so far as the issuing of this writ is concerned. The writ of mandamus as to its enforceability can be likened to a subpœna; and as was said by CHIEF JUSTICE MARSHALL in the *Burr case:* "That the President of the United States may be subpœnaed and examined as a witness, and required to produce any paper in his possession,

[54] (1803) 1 Cranch 137.

is not controverted. The President, although subject to the general rules which apply to others, may have sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the court from enforcing its production."[55]

The President may therefore for reasons sufficient decline to obey the mandate of a court, and hence the issuance of a mandamus would be futile; and if so with the President, why is it not equally true of the Governor of a state?

The Governor is the representative of the people of the state; so are the legislators, and both being the agents of the people, would it be just that the one body or department should dictate to the other?

The Constitution of the state divides the government into three departments, the legislative, judicial and executive, and declares that they shall be separate, distinct and independent; co-ordination and equality are clearly implied from that declaration, and for that reason the writ of mandamus cannot issue from the judicial department directed to the Governor to command the performance of some act or duty on the part of the latter.

The Governor's liability to impeachment and to removal from office, is declared in the Constitution, and it is obvious that the framers of the Constitution intended that, and that alone, to be the remedy for violation of duty by the chief executive.

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[55] Burr's Trial (Robertson) II, 535.